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Chapter 627: Not All Spice is Nice

Kendall Fisher

University of the Pacific, McGeorge School of Law

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Chapter 627: Not All Spice is Nice

*Kendall Fisher**

Code Sections Affected

Health and Safety Code §§11400 (amended) and 11401 (amended).
SB 1036 (Hernandez); 2016 STAT. Ch. 627.

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I. INTRODUCTION

Think of spices, bath salts, and Scooby Snacks—chances are, innocuous items probably come to mind for each of those: maybe cinnamon, toiletries, and

* J.D. candidate, University of the Pacific, McGeorge School of Law, to be conferred May 2018; B.A., Psychology, San Francisco State University, 2014. First I would like to thank my mom Mary and sister Marilyn for their endless support, and for taking care of me and dealing with me while I am in law school. I would also like to thank Distinguished Professor of Law Michael Vitiello for his invaluable help and guidance both in this article and throughout my law school career. I am also grateful to Rosemary Deck and Jessica Gosney for being such great mentors and showing me the wonders of Law Review. Finally, thank you to Wiemond Wu for always providing me with “friendly competition.”

dog treats.¹ However, a trip into most smoke shops and many gas stations will give these words new meaning,² for they are just a few of the many names for synthetic marijuana and cathinones, man-made substances designed to imitate the effects of illegal drugs.³ Manufacturers of these drugs constantly alter the formulas and sell them in seemingly innocent packaging to stay under the radar of law enforcement.⁴ The appeal of these drugs is largely due to their easy availability, the fact that they do not show up on standard drug tests, and the general perception of some amount of legality surrounding their use—they are often marketed as a “legal” alternative to marijuana.⁵ Synthetic marijuana is particularly popular among teenagers who expect it to provide the same experience as natural cannabis.⁶ As explored throughout this article, however, synthetic cannabis has little in common with marijuana, and its use carries a much higher incidence of dangerous and often fatal side effects.⁷ Before Chapter 627, regulation of synthetic cannabis in California was limited to five specific formulas out of the many that proliferate in the underground market.⁸ Chapter 627 expands regulation of synthetic cannabis by amending the current definition of a controlled substance analog to include all cannabinoid structures that are

1. Kristen Gwynne, *The Truth About Synthetic Marijuana Known as Spice*, ROLLING STONE (July 11, 2015), <http://www.rollingstone.com/culture/news/the-truth-about-synthetic-marijuana-known-as-spice-20150711> (on file with *The University of the Pacific Law Review*); Cassie Rodenberg, *The Rise of K2—the Drug is Legal, Dangerous—and Can’t Be Stopped*, THE GUARDIAN (Aug. 1, 2016), <https://www.theguardian.com/us-news/2016/aug/01/k2-synthetic-marijuana-legal-drug-dangerous> (on file with *The University of the Pacific Law Review*). For examples of the innocuous items, see *Pie Spice*, PENZEYS SPICES, <https://www.penzeys.com/online-catalog/pie-spice/c-24/p-3079/pd-s> (last visited Aug. 4, 2016) (on file with *The University of the Pacific Law Review*) (spice); *Bath Salts*, BED BATH & BEYOND, <http://www.bedbathandbeyond.com/1/3/bath-salts> (last visited Aug. 4, 2016) (on file with *The University of the Pacific Law Review*) (bath salts); *Sausages Scooby Snacks*, TARGET, <http://www.target.com/p/snausages-scooby-snacks-for-small-medium-dogs-24-oz/-/A-14695753> (last visited Aug. 4, 2016) (on file with *The University of the Pacific Law Review*) (Scooby Snacks, a dog treat).

2. *DrugFacts: Synthetic Cathinones*, DRUG ABUSE (Jan. 2016), <https://www.drugabuse.gov/publications/drugfacts/synthetic-cathinones-bath-salts> (on file with *The University of the Pacific Law Review*); Emily Foxhall, *‘Spice’ is a Deadly Ingredient*, LOS ANGELES TIMES (July 26, 2014), <http://www.latimes.com/tn-dpt-me-0727-hoag-spice-20140726-story.html> (on file with *The University of the Pacific Law Review*). For examples of less innocuous uses of these words, see *Diesel Spice Incense*, THE OFFICIAL K2 INCENSE, <http://www.theofficialk2incense.com/buy/spice-blends/diesel-smoke/> (last visited Aug. 4, 2016) (on file with *The University of the Pacific Law Review*) (spice); *Buy Bath Salts Online Legal*, K2 INCENSE ONLINE, http://www.k2bathsalts.com/Bath_Salts_Page_1.html (last visited Aug. 4, 2016) (on file with *The University of the Pacific Law Review*) (bath salts); *Scooby Mix Deal*, SPICE4FUN, <http://www.spice4fun.com/scoobymix.html> (last visited Aug. 4, 2016) (on file with *The University of the Pacific Law Review*) (Scooby “Snax”).

3. Gwynne, *supra* note 1.

4. *Id.*

5. *Id.*

6. *Id.*

7. Foxhall, *supra* note 2; Gwynne, *supra* note 1; Andrea Rael, *What Is Synthetic Marijuana and How Does It Compare to Traditional Marijuana?*, HUFFINGTON POST (Sept. 11, 2013), http://www.huffingtonpost.com/2013/09/11/synthetic-marijuana_n_3908171.html (on file with *The University of the Pacific Law Review*).

8. CAL. HEALTH & SAFETY CODE § 11357.5(b) (enacted by 2011 Cal. Stat. Ch. 420).

substantially similar to synthetic cannabinoids, not just those that are listed out in the statute.⁹

II. LEGAL BACKGROUND

In the November 2016 election California voters passed Proposition 64, legalizing recreational marijuana use and limited possession and cultivation for adults over the age of 21.¹⁰ This did not affect the legal status of synthetic cannabinoids; however, even with the legalization of recreational marijuana, synthetic cannabinoids remain a controlled substance under California law.¹¹ These substances present distinct risks that are not common in natural marijuana use and thus warrant regulation independent of marijuana legalization.¹² Before Chapter 627, California law prohibited the sale, use, or possession of five enumerated synthetic cannabinoids.¹³ However, there are many more formulations of synthetic cannabis that were not prohibited by California law, despite presenting the same risks.¹⁴

The effectiveness of regulating only those substances with the exact chemical makeup of a prohibited drug is limited.¹⁵ Underground manufacturers can alter imitation substances that have substantially the same effects as the prohibited drug but differ just enough in chemical makeup where they are not considered illegal—at least until law enforcement catches up.¹⁶ Thus, the cycle continues, and manufacturers can stay a few steps ahead of the legal system by constantly altering the drug just enough to evade its immediate classification as an illegal substance.¹⁷

A. *Synthetic Cannabis Was Never Supposed to Leave the Lab*

Synthetic cannabis was developed during the 1980s when Dr. John W. Huffman at Clemson University led a team of scientists to conduct studies on

9. *Id.* § 11357.5 (amended by Chapter 624); *id.* §§ 11400, 11401 (amended by Chapter 627).

10. CAL. HEALTH & SAFETY CODE § 11362.1(a) (West 2016); Katy Steinmetz, *These States Just Legalized Marijuana*, TIME (Nov. 10, 2016, 4:59 PM), <http://time.com/4559278/marijuana-election-results-2016/> (on file with *The University of the Pacific Law Review*).

11. CAL. HEALTH & SAFETY CODE § 11357.5 (amended by Chapter 624).

12. Alice G. Walton, *Why Synthetic Marijuana is More Toxic to the Brain Than Pot*, FORBES (Aug. 28, 2014, 10:40 AM), <http://www.forbes.com/sites/alicegwalton/2014/08/28/6-reasons-synthetic-marijuana-spice-k2-is-so-toxic-to-the-brain/#59748f3449eb> (on file with *The University of the Pacific Law Review*).

13. CAL. HEALTH & SAFETY CODE § 11357.5(b) (enacted by 2011 Cal. Stat. Ch. 420).

14. Walton, *supra* note 12.

15. *Id.*

16. *Id.*

17. *Id.*

interactions between drugs and the brain.¹⁸ A few decades later, synthetic marijuana emerged in the recreational market—first in Germany in 2008 and soon in other countries, including the United States.¹⁹ In a 2011 interview with the *Los Angeles Times*, Dr. Huffman stated, “These things are dangerous—anybody who uses them is playing Russian roulette We never intended them for human consumption.”²⁰ Despite that intention, he said, “[O]ppportunists . . . saw a ready market in stoners” and took advantage of the formulas.²¹ Dr. Huffman explained that two of the 460 formulas his team created are particularly easy to produce from “commonly available starting materials.”²² He received calls from “law enforcement agencies, the military, and panicked parents”²³ in 2009 soon after synthetic cannabis based on his formulas entered the United States market.²⁴ Each year since, numerous users have died and many more have been injured from smoking synthetic cannabis, with at least 456 spice-related deaths in the United States alone reported from 2010–2015.²⁵

Teenagers are the target consumer group of synthetic cannabis, and they often view it as a “legal” version of marijuana that they can buy before they are old enough to purchase the real thing.²⁶ People who would otherwise use traditional drugs like marijuana or cocaine are often drawn to synthetic cannabis because standard drug tests will not reveal its presence in a person’s body.²⁷ The drug goes by several names, including spice, K-2, skunk, fake weed, and JWH (Dr. Huffman’s initials).²⁸ Versions of the drug not yet outlawed are available online²⁹ and at gas stations and smoke shops.³⁰ It is worth noting that one

18. David Zucchino, *Scientist’s Research Produces a Dangerous High*, LOS ANGELES TIMES (Sept. 28, 2011), <http://articles.latimes.com/2011/sep/28/nation/la-na-killer-weed-20110928> (on file with *The University of the Pacific Law Review*).

19. Walton, *supra* note 12.

20. Zucchino, *supra* note 18.

21. *Id.*

22. *Id.*

23. Jenny L. Wiley et al., *Hijacking of Basic Research: The Case of Synthetic Cannabinoids*, NATIONAL INSTITUTES OF HEALTH (Nov. 2011), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3567606/pdf/nihms412799.pdf> (on file with *The University of the Pacific Law Review*).

24. *The History of Synthetic Drugs (Spice, K2 and Bath Salts)*, NARCONON, <http://www.narconon.org/drug-abuse/synthetic-drugs-history.html> (last visited July 4, 2016) (on file with *The University of the Pacific Law Review*).

25. *Acute Poisonings from Synthetic Cannabinoids—50 U.S. Toxicology Investigators Consortium Registry Sites, 2010–2015*, CDC (July 15, 2016), <http://www.cdc.gov/mmwr/volumes/65/wr/mm6527a2.htm> (on file with *The University of the Pacific Law Review*).

26. Rael, *supra* note 7; Walton, *supra* note 12.

27. Walton, *supra* note 12.

28. *Id.*

29. See, e.g., *Buy K2 Spice Incense Online: Official K-2 Supplier*, THE OFFICIAL K2 INCENSE, <http://www.theofficialk2incense.com/buy-k2-incense/> (last visited July 3, 2016) (on file with *The University of the Pacific Law Review*) (offering several different varieties of synthetic cannabis under the label of “incense”).

synthetic marijuana manufacturer announces on its website that “all old K2 Spice blends have restrictions on them in most US states, so are now discontinued and no longer available to purchase.”³¹

On its explanatory “How to Smoke K2 Incense” page, one manufacturer provides, “Yes, K2 is synthetic marijuana....What you should not plan on doing is rolling your K2 into a joint and literally smoking it. That is not how K2 works.”³² The website instead recommends users burn it as incense and inhale the smoke indirectly as it dissipates throughout the room.³³ The packages even contain a warning that the substance is “not for human consumption.”³⁴ However, in reality, users almost always smoke it directly, like they would marijuana.³⁵ This is dangerous for many reasons, but two stand out in particular: first, spice³⁶ is chemically different from natural cannabis and produces different and stronger physiological effects than marijuana when smoked;³⁷ and second, there is virtually no quality control in spice production.³⁸

Spice is chemically distinct from marijuana, and the perceived association between the substances is largely due to misleading labeling on spice packages.³⁹ The synthetic drug is often manufactured in China or in underground American labs from a random assortment of herbs, and then sprayed by hand with synthetic cannabinoid chemicals.⁴⁰ Dr. Paul Prather, a professor of pharmacology and toxicology at the University of Arkansas for Medical Sciences, explained there are “almost always ‘hot spots’ . . . where the drug is way more concentrated than others.”⁴¹ He continued, “There’s almost always more than one synthetic

30. Adam Tod Brown, *6 Terrifying Reasons You Shouldn’t Smoke Synthetic Weed*, CRACKED (Dec. 30, 2011), <http://www.cracked.com/blog/6-terrifying-reasons-you-shouldnt-smoke-synthetic-weed/> (on file with *The University of the Pacific Law Review*).

31. *Buy K2 Spice Incense Online: Official K-2 Supplier*, *supra* note 29.

32. *How to Smoke K2 Herbal Incense the Right Way*, THE OFFICIAL K2 INCENSE, <http://www.theofficialk2incense.com/education/how-to-smoke-k2-herb/> (last visited July 4, 2016) (on file with *The University of the Pacific Law Review*).

33. *Id.*

34. Wiley et al., *supra* note 23.

35. *How Marijuana is Consumed or Ingested*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/facts/drug-facts/marijuana/how-marijuana-consumed> (last visited Aug. 4, 2016) (on file with *The University of the Pacific Law Review*); Rael, *supra* note 7. See, e.g., Foxhall, *supra* note 2 (documenting the story of a 19-year-old who suffered brain death and died from smoking one hit of spice the week before).

36. For the rest of this article, “spice” will be used interchangeably with “synthetic cannabinoids” and “synthetic cannabis.” The three terms refer equally to synthetic marijuana. “Spice,” as noted above, is an informal term for synthetic marijuana. See *supra* note 28 and accompanying text (laying out several nicknames for synthetic cannabis).

37. Rael, *supra* note 7. See, e.g., Joe Lawlor, *Maine Seeing Surge of Scary Drug Called Spice*, PORTLAND PRESS HERALD (July 25, 2013), http://www.pressherald.com/2013/07/25/rising-toll-of-a-scary-drug_2013-07-25/ (on file with *The University of the Pacific Law Review*) (chronicling one 13-year-old boy’s near-death experience after smoking spice, which he mistakenly believed would be similar to marijuana).

38. Walton, *supra* note 12.

39. Wiley et al., *supra* note 23.

40. *Id.*

41. Walton, *supra* note 12.

cannabinoid present in these things—usually four or five different ones.”⁴² Due to the chemical departure from natural marijuana and the lack of quality control, common side effects of using spice include seizures, brain damage, paranoia, vomiting, and hallucinations.⁴³

*B. Federal Analog Act*⁴⁴

Synthetic cannabinoids and analogs of other controlled substances are illegal under federal law.⁴⁵ However, federal prosecutions will be brought only for violations of federal law, the scope of which is limited by Congress’ power under the Constitution and principles of federalism.⁴⁶ Consequently, many synthetic cannabis cases, particularly those involving smaller amounts of the drug, are left to state law enforcement.⁴⁷ To prosecute synthetic cannabinoid offenses at the state level, therefore, states must have their own statutes prohibiting the substance.⁴⁸

C. SB 420 (Hernandez)

Senate Bill 420, introduced in 2011 by Senator Ed Hernandez (D-West Covina), made illegal the sale, possession, or use of certain formulations of synthetic cannabis.⁴⁹ The bill outlawed five specified molecular formulas of synthetic cannabinoids that are now among those listed in section 11357.5(b) of the California Health and Safety Code.⁵⁰ The bill, signed into law by Governor Jerry Brown in 2011, laid the foundation for regulation of synthetic cannabis.⁵¹ However, the bill’s reach was limited to those five enumerated chemical formulas,⁵² and in effect, its enactment only highlighted which formulas underground manufacturers should avoid.⁵³

Although it is possible for the legislature to constantly amend the Code to add specific formulas as they are discovered, it is ineffective for each slight

42. *Id.*

43. *Id.*

44. 21 U.S.C.S. § 813 (2016).

45. *Id.*

46. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 270–71, 336–38, 340 (5th ed. 2015) (discussing how Congress must point to an enumerated power, often the Commerce Clause, to support its legislation, and that the Tenth Amendment reserves all other powers to the States).

47. *Id.* at 326–27.

48. *Id.*

49. CAL. HEALTH & SAFETY CODE § 11357.5(b) (enacted by 2011 Cal. Stat. Ch. 420).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

chemical variation to go through the lengthy legislative process.⁵⁴ By the time an additional formula is prohibited by statute, underground manufacturers have introduced several more and will likely never return to production of those now-prohibited formulas.⁵⁵ The “outdated legal loopholes”⁵⁶ of the law before Chapter 627 allowed a constant stream of varied synthetic cannabinoids to filter into the market.⁵⁷ A more proactive approach is necessary to outlaw these substances before they hit the streets.⁵⁸ Chapter 627 aims to provide that approach.⁵⁹

III. CHAPTER 627

Chapter 627 amends the current definition of a controlled substance analog to include all cannabinoid structures that are substantially similar to synthetic cannabinoids.⁶⁰ Existing law defines an “analog” as a substance that either: (1) has a chemical structure that is substantially similar to that of a controlled substance, or (2) has, is represented as having, or is intended to have, a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to, or greater than, such effect of a controlled substance.⁶¹ Under the new law, a substance that shares one or both of these characteristics with a synthetic cannabinoid compound is considered a controlled substance.⁶²

By legally equating these analogs with the enumerated synthetic cannabinoids, Chapter 627 provides the same punishment for certain conduct with both types of substances.⁶³ Therefore, Chapter 627 provides that it is a misdemeanor to “sell, dispense, distribute, furnish, administer, or give, or offer to sell, dispense, distribute, furnish, administer, or give, or possess for sale”⁶⁴ an analog of an enumerated synthetic cannabinoid.⁶⁵ Chapter 627 further provides that it is an infraction to “use or possess”⁶⁶ an analog of an enumerated synthetic cannabinoid.⁶⁷

Chapter 627 retains the exemption provided under Section 355 of the federal Food, Drug, and Cosmetic Act.⁶⁸ This exemption provides that it is lawful for an

54. Walton, *supra* note 12.

55. *Id.*

56. Gwynne, *supra* note 1.

57. Walton, *supra* note 12.

58. *Id.*

59. CAL. HEALTH & SAFETY CODE §§ 11400, 11401 (amended by Chapter 627).

60. *Id.*

61. *Id.* § 11401(a)–(b).

62. *Id.* §§ 11400, 11401.

63. *Id.*

64. *Id.* § 11357.5.

65. *Id.* §§ 11400, 11401.

66. *Id.* § 11357.5.

67. *Id.* §§ 11400, 11401.

68. Food, Drug, and Cosmetic Act, 21 U.S.C. § 355 (2016).

individual to possess an otherwise illegal substance if the Secretary of Health and Human Services has approved that individual's use of the particular substance for an investigative purpose.⁶⁹ Chapter 627 also maintains that the prohibition does not apply to substances generally recognized as safe and effective.⁷⁰

IV. ANALYSIS

Chapter 627 bridges the gap between California law and synthetic cannabis manufacturers.⁷¹ By expanding regulation to prohibit analogs of all enumerated synthetic cannabinoids, Chapter 627 eliminates the "legal loophole"⁷² that has allowed manufacturers to keep their products under the radar of law enforcement.⁷³ Chapter 627 serves an important purpose in the current state of California's drug laws by preventing spice manufacturers from circumventing a previously stagnant law and supplying a steady stream of dangerous drugs into our society.⁷⁴

However, Chapter 627 may serve a largely temporary function.⁷⁵ The popularity of spice arose mainly because of marijuana's classification as an illegal substance.⁷⁶ Now, however, as of the November 2016 election, recreational marijuana is legal in California.⁷⁷ Although the state's synthetic cannabis statute, as established by Chapter 420 and amended by Chapter 627, targets synthetic cannabinoids for their inherent risks independent of their association with marijuana, the balance may shift with recent recreational marijuana legalization.⁷⁸ Strict enforcement of the new drug crimes put in place by Chapter 627 may no longer be necessary if the demand for synthetic cannabis dramatically decreases in response to marijuana's legality.⁷⁹ Further, on a broader level, Californians may be moving away from the "tough on crime" mentality of the last few decades and reconsidering sentencing reform: in the November 2016 election, voters passed Proposition 57, which relaxes mandatory sentences and increases parole opportunities for inmates.⁸⁰ Such a change in the constituency's

69. *Id.*

70. 21 C.F.R. § 330.1 (2016).

71. CAL. HEALTH & SAFETY CODE §§ 11400, 11401 (amended by Chapter 627).

72. Gwynne, *supra* note 1.

73. *Id.*; Rael, *supra* note 7.

74. Gwynne, *supra* note 1; Rael, *supra* note 7.

75. *Id.*

76. Rael, *supra* note 7; *see, e.g.*, Gwynne, *supra* note 1 ("The prohibition of marijuana has created the demand for a legal alternative.").

77. Steinmetz, *supra* note 10.

78. CAL. HEALTH & SAFETY CODE § 11357.5 (amended by Chapter 624); *id.* §§ 11400, 11401 (amended by Chapter 627).

79. *Id.* § 11357.5 (amended by Chapter 624); *id.* §§ 11400, 11401 (amended by Chapter 627).

80. John Myers, *Proposition 57, Gov. Jerry Brown's Push to Loosen Prison Parole Rules, is Approved by Voters*, LOS ANGELES TIMES (Nov. 8, 2016, 9:14 PM), <http://www.latimes.com/nation/politics/trailguide/la-na->

perspective does not harmonize well with the expansion of drug crimes; while vetoing bills that would have established mandatory minimum sentences for other offenses, Governor Brown himself wrote, “Before we keep going down this road, I think we should pause and reflect on how our system of criminal justice could be made more human, more just and more cost-effective.”⁸¹ Even so, California needs an immediate solution to cover the statutory loopholes that have allowed the current spice epidemic to run rampant, and Chapter 627 does just that.⁸²

A. *Organizations in Support of and Opposition to Chapter 627*

1. *Organizations in Support*

Over twice as many groups registered in support of Chapter 627 as those in opposition to the bill.⁸³ Law enforcement organizations, including the Association of Deputy District Attorneys, the California Police Chiefs Association, and the California State Sheriff’s Association, constituted most of the support.⁸⁴ In fact, only one group that registered in support of Chapter 627 is not involved in law enforcement—the Consortium Management Group (CMG).⁸⁵ In arguing for the bill’s passage, CMG cited how the legislation would help law enforcement stay ahead of spice manufacturers.⁸⁶ CMG, which works with medical marijuana dispensaries, also argued that the bill would help prevent “the perpetuation of an unpredictable, life-threatening synthetic compound that is inappropriately characterized as an alternative to cannabis,”⁸⁷ which is “antithetical”⁸⁸ to CMG’s goal of “ensur[ing] protection for medical marijuana patients.”⁸⁹

CMG’s argument can be appropriately extended to users of recreational marijuana as well: even though recreational use of marijuana is now legal in California, it should remain similarly unacceptable for a dangerous substance, distinct from marijuana in both its physiological effects and chemical makeup, to be marketed as an alternative to natural marijuana.⁹⁰ Colorado provides one

election-day-2016-proposition-57-gov-jerry-brown-prison-1478452055-htmlstory.html (on file with *The University of the Pacific Law Review*).

81. Edmund G. Brown, (2015), https://www.gov.ca.gov/docs/AB_144_Veto_Message.pdf (last visited Dec. 20, 2016) (on file with *The University of the Pacific Law Review*).

82. CAL. HEALTH & SAFETY CODE §§ 11400, 11401 (amended by Chapter 627); Rael, *supra* note 7.

83. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1036, at 5 (Apr. 20, 2016).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 6.

88. *Id.*

89. *Id.*

90. *Id.*

example: that state legalized recreational marijuana in 2012,⁹¹ but spice remains a threat to public safety.⁹² Although marijuana legalization would likely relieve much of the risk synthetic cannabis presents to society, it would not eradicate the problem in any state.⁹³

2. *Organizations in Opposition*

Four groups registered in opposition to Chapter 627: the American Civil Liberties Union, California Attorneys for Criminal Justice, the California Public Defenders Association, and the Drug Policy Alliance (DPA).⁹⁴ The DPA's argument was based on its general stance against "punishing people for simple possession of a controlled substance."⁹⁵ The DPA is a nonprofit organization that advocates for drug law reform,⁹⁶ and here it expressed concern that criminalizing spice will "push[] risky behavior underground where people who need help the most are the least likely to get it."⁹⁷

The DPA suggested better public education on the harms of spice and other synthetic drugs as an alternative to criminalizing their use.⁹⁸ However, the DPA provided no direct solution for battling underground spice manufacturers, a problem which Chapter 627 at least attempts to address by broadening the scope of regulation; instead, the DPA argued that "online retailers . . . based in foreign countries"⁹⁹ are a main source of synthetic cannabinoids, and that they pose a "threat that will not be removed by California prohibitions."¹⁰⁰ Although much of the spice seen in the United States is made in foreign countries, there are also many underground manufacturers within the country that would be directly affected by Chapter 627.¹⁰¹ The DPA's suggested public education on the

91. Aaron Smith, *Marijuana Legalization Passes in Colorado*, Washington, CNN (Nov. 8, 2012), <http://money.cnn.com/2012/11/07/news/economy/marijuana-legalization-washington-colorado/> (on file with *The University of the Pacific Law Review*).

92. DEA: *Several Arrested in Tucson Area in Federal Drug Bust*, AZ FAMILY (July 28, 2016), <http://www.azfamily.com/story/32567814/dea-several-arrested-in-tucson-area-in-federal-drug-bust> (on file with *The University of the Pacific Law Review*) (mentioning that 32 federal search warrants for synthetic cannabinoid production included locations in Denver, Colorado).

93. Gwynne, *supra* note 1; Rael, *supra* note 7.

94. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1036, at 5 (Apr. 20, 2016).

95. *Id.* at 6.

96. *About the Drug Policy Alliance*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/about-us/about-drug-policy-alliance> (last visited Aug. 3, 2016) (on file with *The University of the Pacific Law Review*).

97. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1036, at 6 (Apr. 20, 2016).

98. *Id.* at 7.

99. *Id.* at 6.

100. *Id.*

101. *Synthetic Weed – Who Is Making It?*, CITIZENS COMMISSION ON HUMAN RIGHTS (June 25, 2016), <http://www.cchrflorida.org/synthetic-weed-who-is-making-it/> (on file with *The University of the Pacific Law Review*).

dangers of spice would not make the situation worse, but it would not directly attack the source of synthetic cannabinoids.¹⁰²

Perhaps the DPA's approach would be more appropriate at a time when people do not use spice because of the reasons listed above—that it does not show up on a drug test, is easy to obtain, and is marketed as an alternative to marijuana.¹⁰³ Public education can only do so much to keep people from looking for a “legal” high that will not show up on a drug test.¹⁰⁴ The search for this “legal” alternative to marijuana is at the root of the spice epidemic and will remain a problem for individuals under the age of 21 who are unable to lawfully obtain recreational marijuana.¹⁰⁵

B. Expanding Regulation Beyond Five Enumerated Formulas

Senate Bill 420, signed into law in October 2011, was the first piece of legislation in California to prohibit the sale, use, or possession of spice; it outlawed the same five formulas of the drug that the United States Drug Enforcement Administration (DEA) placed under emergency Schedule I classification earlier that year.¹⁰⁶ It soon became apparent, however, that banning five chemical formulas was not effective against spice manufacturers, who simply alter their products just enough to avoid their immediate classification as a controlled substance.¹⁰⁷

1. How Else Could the Legal System Address the Spice Epidemic?

As previously discussed, an alternative to Chapter 627's broad, proactive approach is to add individual synthetic cannabinoid formulas to the criminal code as they are discovered.¹⁰⁸ This is the method currently utilized at the federal level.¹⁰⁹ Notably, it is reactive and provides a lag time where new variations of

102. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1036, at 6 (Apr. 20, 2016).

103. Gwynne, *supra* note 1; Rael, *supra* note 7.

104. *Id.*

105. *Id.*

106. Giana Magnoli, *Gov. Brown Signs Into Law Legislation Banning Synthetic Marijuana Products*, NOOZHAWK (Oct. 6, 2011), https://www.noozhawk.com/article/100511_brown_bans_synthetic_marijuana_products (on file with *The University of the Pacific Law Review*); *Schedules of Controlled Substances: Temporary Placement of Five Synthetic Cannabinoids Into Schedule I*, DEPARTMENT OF JUSTICE (Mar. 1, 2011), http://www.deadiversion.usdoj.gov/fed_regs/rules/2011/fr0301.htm (on file with *The University of the Pacific Law Review*).

107. Gwynne, *supra* note 1; Rael, *supra* note 7.

108. *See infra* Part II.B. (noting the alternative approach of adding new substances to constantly amend the code).

109. *See, e.g.*, Tim Devaney, *Feds Crack Down on Fake Marijuana*, THE HILL (Dec. 18, 2014), <http://thehill.com/regulation/227567-feds-crack-down-on-fake-marijuana> (on file with *The University of the Pacific Law Review*) (“As the DEA discovers new strains of synthetic marijuana, it adds them to its list of Schedule I controlled substances.”).

spice are not illegal.¹¹⁰ Further, taking legislative action for each individual formula as it is discovered is both financially and temporally draining on public resources.¹¹¹ However, this process is better than nothing in the fight against the spice epidemic, and it still serves as a useful backup tool in prosecuting spice manufacturers.¹¹²

Another bill, signed into law by Governor Jerry Brown on the same day as Chapter 627, adds several newly developed forms of synthetic cannabinoids to the Health & Safety Code.¹¹³ This law, Chapter 624, was introduced by Senator Cathleen Galgiani (D-Stockton) and adds “numerous chemical families or classes and a myriad of individual chemicals”¹¹⁴ to the list of prohibited synthetic cannabinoids in Section 11357.5 of the Health & Safety Code.¹¹⁵ Since Chapter 627 prohibits analogs of all cannabinoids in Section 11357.5, Chapter 624 increases the scope of Chapter 627’s regulation.¹¹⁶

Because it provides that all “analogs”¹¹⁷ of the enumerated formulas are illegal, Chapter 627 lays a foundation for law enforcement to more effectively take action against spice manufacturers.¹¹⁸ It will no longer be necessary to wait for spice formulas to be individually outlawed before enforcing their prohibition.¹¹⁹

2. Even with Expanded Regulation, It Will Remain Difficult to Combat the Dangerous Effects of Synthetic Cannabis

While streamlining regulation of synthetic cannabinoids makes the law enforcement process easier, another issue remains: because spice formulas are so varied and do not surface on standard drug tests, hospital staff often have trouble administering appropriate treatment to individuals who show up in emergency rooms after using the drug.¹²⁰ Spice users also have different reactions to different formulas, so symptoms are not always dispositive of the source of the ailment.¹²¹ Common effects of spice ingestion include any combination of

110. Join Together Staff, *DEA Bans Three New Strains of Synthetic Marijuana*, PARTNERSHIP FOR DRUG FREE KIDS (Jan. 7, 2015), <http://www.drugfree.org/news-service/dea-bans-three-new-strains-synthetic-marijuana/> (on file with *The University of the Pacific Law Review*).

111. Walton, *supra* note 12.

112. Join Together Staff, *supra* note 110.

113. CAL. HEALTH & SAFETY CODE § 11357.5(c) (amended by Chapter 624).

114. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 139, at 1 (Aug. 18, 2015).

115. CAL. HEALTH & SAFETY CODE § 11357.5 (amended by Chapter 624); *id.* § 11375.7 (enacted by Chapter 624).

116. *Id.*

117. *Id.* § 11375.5(b) (amended by Chapter 624); *id.* §§ 11400, 11401 (amended by Chapter 627).

118. *Id.*

119. *Id.*

120. Foxhall, *supra* note 2; Gwynne, *supra* note 1.

121. Wiley et al., *supra* note 23.

psychosis, heart attacks, seizures, cerebral edema, extreme personality changes, and death.¹²² Further, people often react to spice differently than they would to marijuana, so any supposed similarities between the substances are not helpful for determining appropriate treatment in the emergency room.¹²³

One tragic example of the devastating effects of spice occurred in 2014 in Orange County.¹²⁴ Within 24 hours, one hit of spice rendered 19-year-old Connor Eckhardt comatose with a swollen brain.¹²⁵ He was pronounced brain dead and died later that week.¹²⁶ One of the only ways the hospital could determine he had ingested spice was through circumstantial evidence—Connor still had the remainder of the spice package in his pocket when he arrived at the emergency room.¹²⁷ “Tests run at the hospital would not detect spice. The ever-changing components make it difficult for scientists to develop a standard way to trace it.”¹²⁸ Connor’s story is one of many that show the real tragedy of the spice epidemic.¹²⁹ While legislation like Chapter 627 can make it easier to enforce drug laws against spice manufacturers, the legal status of the substance makes little difference in the emergency room.¹³⁰

C. Chapter 627, Looking Forward

Although overall demand for spice will likely decrease in the wake of recreational marijuana legalization, Chapter 627 is still a worthy addition to California law because synthetic cannabis will remain a threat to public safety.¹³¹ The substance will retain appeal for people under the age of 21 who are too young to legally purchase natural marijuana.¹³² However, as discussed below, prosecution under certain provisions of Chapter 627 may prove difficult due to the inherent ambiguities of the synthetic cannabis industry.¹³³

122. Foxhall, *supra* note 2; Wiley et al., *supra* note 23; Christina Zdanowicz, *Teen Narrowly Escapes Death After Smoking Synthetic Marijuana*, CNN (Feb. 5, 2013), <http://www.cnn.com/2013/02/04/health/synthetic-marijuana-irpt/index.html> (on file with *The University of the Pacific Law Review*).

123. Wiley et al., *supra* note 23 (explaining results of clinical studies showing that, compared to marijuana, spice resulted in higher blood pressure and increased and more severe nausea and vomiting, instances of suicidal thoughts, and general anxiety).

124. Foxhall, *supra* note 2.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. See, e.g., Zdanowicz, *supra* note 122 (documenting one teenager’s month-long journey in the hospital from being comatose on life support to beginning to recognize her family’s voices again after smoking spice).

130. Foxhall, *supra* note 2; Gwynne, *supra* note 1.

131. Gwynne, *supra* note 1.

132. CAL. HEALTH & SAFETY CODE § 11362.1(a) (West 2016); Gwynne, *supra* note 1.

133. See *infra* Part IV(C)(2) (discussing potential issues in enforcing Chapter 627).

1. *Recreational Marijuana Legalization*

The legalization of recreational marijuana in California will likely cause a great decrease in spice abuse.¹³⁴ The Drug Policy Alliance explains on its synthetic marijuana information web page that an international study¹³⁵ showed “90 percent of people surveyed who use synthetic cannabinoid products strongly prefer natural marijuana—suggesting that if marijuana were legally available, then demand for synthetic cannabinoids would largely disappear.”¹³⁶ The DPA is one of many voices in the discussion that envision a dramatic decrease in spice abuse because of recreational marijuana legalization.¹³⁷ Despite this envisioned decrease, individuals that are too young to legally purchase natural marijuana will still likely turn to synthetic cannabis as a relatively easy alternative.¹³⁸ Some level of demand for synthetic cannabis will remain even after recreational marijuana legalization.¹³⁹

2. *Potential Issues in Enforcing Chapter 627*

As amended by Chapter 627, Sections 11401(1) and (2) of the Health & Safety Code define an analog as a substance which “is substantially similar”¹⁴⁰ or “has, is represented as having, or is intended to have a[n] . . . effect . . . substantially similar to . . . the effect . . . of a controlled substance.”¹⁴¹ Application of this language is relatively straightforward if it can be determined that the chemical makeup of the substance is substantially similar to one of the enumerated synthetic cannabinoids—either those initially prohibited by Chapter 420 or added by Chapter 624.¹⁴² However, implementation of the statute is more difficult when law enforcement officials must determine that the manufacturer “represented” or “intended” the substance to have a substantially similar effect as one of the five enumerated formulas.¹⁴³ There, simply showing chemical similarities between the defendant’s substance and the controlled analog would

134. Gwynne, *supra* note 1.

135. A.R. Winstock & M.J. Barratt, *Synthetic Cannabis: A Comparison of Patterns of Use and Effect Profile with Natural Cannabis in a Large Global Sample*, DRUG AND ALCOHOL DEPENDENCE (Jan. 3, 2013), doi: 10.1016/j.drugalcdep.2012.12.011 (on file with *The University of the Pacific Law Review*).

136. *Synthetic Cannabinoids* (“Spice”, “K2”, etc.), DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/drug-facts/synthetic-cannabinoids-spice-k2-etc> (last visited Aug. 2, 2016) (on file with *The University of the Pacific Law Review*).

137. Gwynne, *supra* note 1.

138. *Id.*

139. *Id.*; see *supra* Part IV(C)(1) (reasoning that individuals too young to legally purchase marijuana will still consider synthetic cannabis a viable alternative).

140. CAL. HEALTH & SAFETY CODE § 11401(a)–(b) (amended by Chapter 627).

141. *Id.*

142. *Id.* § 11357.5(c) (amended by Chapter 624).

143. *Id.* § 11401(b) (amended by Chapter 627).

not secure a conviction;¹⁴⁴ rather, the government must prove that the defendant actually intended the substances to have similar effects or represented that they do.¹⁴⁵ Although this requires the government to show the defendant's intent if the substance is not chemically similar to an enumerated analog, it is not as stringent as some analog statutes under which prosecutors have still secured convictions, like the Federal Analog Act.¹⁴⁶

Analog statutes in other states have struggled with vagueness, but usually because they lack the "substantially similar" language that Chapter 627 maintains.¹⁴⁷ For example, Oklahoma's code does not limit its scope to chemical analogs of illegal drugs and instead prohibits any "imitation controlled substance,"¹⁴⁸ which it defines as any "substance that is not a controlled dangerous substance, which by dosage unit, appearance, color, shape, size, markings or by representations made, would lead a reasonable person to believe that the substance is a controlled dangerous substance."¹⁴⁹ One commentator noted that analog statutes like Oklahoma's are "overly broad"¹⁵⁰ and "may be open to legal challenges,"¹⁵¹ particularly because these statutes lack an exception for products labeled "not for human consumption" to offset their broad language.¹⁵² States can provide for this exception without opening another loophole to spice manufacturers.¹⁵³ For example, Minnesota only extends the exception until a substance is "implicitly or explicitly intended for human consumption,"¹⁵⁴ at which point it is considered a prohibited controlled substance analog.¹⁵⁵

Because Chapter 627's language is more specific than the analog statutes of other states that struggle with vagueness, and because it is broader than the

144. *Id.* § 11401(a) (amended by Chapter 627).

145. *Id.* § 11401(a)–(b) (amended by Chapter 627).

146. *See, e.g.,* United States v. Turcotte, 405 F.3d 515, 527 (7th Cir. 2005) (while affirming the defendant's conviction under the Federal Analog Act, the court interpreted that statute as requiring the government to show the defendant had knowledge that the substance was an analog of a prohibited drug, both chemically and in its physiological effects).

147. Timothy P. Stackhouse, *Regulators in Wackyland: Capturing the Last of the Designer Drugs*, 54 ARIZ. L. REV. 1105, 1120 (2012).

148. OKLA. STAT. tit. 63, § 2-101(19) (West 2016).

149. *Id.*

150. Stackhouse, *supra* note 147, at 1120.

151. *Id.*

152. *Id.* Note that the "not for human consumption" exception would make enforcement even more difficult when spice manufacturers include that pretextual language on synthetic marijuana packaging.

153. *See, e.g.,* 2011 Bill Text MN H.B. 57 (excepting only substances that are neither implicitly nor explicitly intended for human consumption).

154. *Id.*; Stackhouse, *supra* note 147, at 1120.

155. 2011 Bill Text MN H.B. 57; Stackhouse, *supra* note 147, at 1120.

stringent, but “not impossible,”¹⁵⁶ Federal Analog Act, it will likely succeed as a tool for prosecution of synthetic cannabinoid crimes in California.¹⁵⁷

V. CONCLUSION

The threat of synthetic cannabis will probably decrease now that recreational marijuana is legal in California, but it will remain problematic with individuals too young to legally purchase natural marijuana.¹⁵⁸ Teenagers who would rather smoke marijuana choose synthetic cannabis instead because it is easier to obtain and does not show up on standard drug tests.¹⁵⁹ Therefore, our society should continue to take action against deadly synthetic drugs like spice through legislation such as Chapter 627 regardless of the legal status of recreational marijuana.¹⁶⁰ The fight against synthetic cannabinoids is not easily won, but the broad language of Chapter 627,¹⁶¹ especially when combined with Chapter 624’s expanded list of prohibited synthetic cannabinoids,¹⁶² provides California’s law enforcement officials with a powerful arsenal.¹⁶³

156. Stackhouse, *supra* note 147, at 1131.

157. CAL. HEALTH & SAFETY CODE § 11375.5 (amended by Chapter 624); *id.* §§ 11400, 11401 (amended by Chapter 627).

158. Gwynne, *supra* note 1 (“The prohibition of marijuana has created the demand for a legal alternative.”).

159. Foxhall, *supra* note 2; Gwynne, *supra* note 1.

160. CAL. HEALTH & SAFETY CODE § 11375.5 (amended by Chapter 624); *id.* §§ 11400, 11401 (amended by Chapter 627).

161. *Id.* § 11375.5 (amended by Chapter 624); *id.* §§ 11400, 11401 (amended by Chapter 627).

162. *Id.* § 11357.5 (amended by Chapter 624); *id.* § 11375.7 (enacted by Chapter 624).

163. *Id.*